SUPREME COURT, U.S.
FILED
JAN 21 1999
CLERK

No. 98-947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AT&T WIRELESS SERVICES and MCCAW CELLULAR COMMUNICATIONS, INC.,

Petitioners,

v.

CORYELLE TENORE, CHARLES F. PETERSON and KAREN M. COLE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

CASES

AT&T Co. v. *Central Office Tel., Inc.*,
118 S. Ct. 1956 (1998) 10

American Airlines, Inc. v. *Wolens*,
513 U.S. 219 (1995) 7,9

Ball v. *GTE Mobilnet, Inc.*,
No. 98AS03811 (Cal. Super. Ct. (Sacramento County)
Nov. 17, 1998) 5

Bennett v. *Alltel Mobile Communications*,
C.A. No. 96-D-232-N (M.D. Ala. May 14, 1996) 3

Cox Broad. Corp., v. *Cohn*,
420 U.S. 469 (1975) 8

Crandon v. *United States*,
494 U.S. 152 (1990) 7

EEOC v. *Arabian American Oil Co.*,
499 U.S. 244 (1991) 7

Hardy v. *Claircom Communications Group, Inc.*,
937 P.2d 1128 (Wash. App. 1997) 3

Jefferson v. *City of Tarrant, Ala.*,
118 S. Ct. 481 (1997) 8

Kellerman v. *MCI Telecomms. Corp.*,
493 N.E.2d 1045 (Ill. 1986) 6

Laing v. *United States*,
423 U.S. 161 (1976) 7

Lividas v. *Bradshaw*,
512 U.S. 107 (1994) 7

In re Long Distance Telecomms. Litig.,
831 F.2d 627 (6th Cir. 1987) 6

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 7,9

Nader v. *Allegheny Airlines, Inc.*,
426 U.S. 290 (1976) 6,9

Simons v. *GTE Mobilnet, Inc.*,
No. H-95-5169 (S.D. Tex. Apr. 11, 1996) 5

United States v. *Standard Oil Co.*,
332 U.S. 301 (1947) 7

STATUTES & LEGISLATIVE HISTORY

Omnibus Budget Reconciliation Act of 1993,
Pub. L. No. 103-66, 107 Stat. 312 6

47 U.S.C. § 332(c)(3)(A) ..... *passim*

H.R. Rep. No. 103-111, *reprinted in* 1993 U.S.C.C.A.N.
378 7

RULE

Sup. Ct. R. 10(c) 7

REPLY BRIEF OF PETITIONERS

In the petition, AT&T Wireless Services, Inc. and McCaw Cellular Communications, Inc. (jointly, "AT&T Wireless") demonstrated that review by this Court was necessary and appropriate because: 1) resolution of the issue of the preemptive scope of 47 U.S.C. § 332(c)(3)(A) ("Section 332") is critical to Congress' goal of fostering development of the wireless industry by creating a uniform national regulatory environment free from State regulation of "rates charged" -- a goal imperiled by scores of class action lawsuits predicated on state law claims seeking hundreds of millions of dollars in the form of rate refunds; 2) there is wide-spread conflict and confusion among the federal and state courts and agencies regarding the preemptive scope of Section 332; and 3) the Washington Supreme Court's decision conflicts with decisions by this Court regarding the scope of the term "rates," whether refund damages constitute rate regulation, and the proper standards for resolving the scope of an express preemption provision such as Section 332.

Respondents' Brief in Opposition ("Resp. Br.") does not undermine this showing. Most critically, respondents fail to address the principle reason that review should be granted: resolution of the preclusive effect of Section 332 is an issue of critical importance to scores of similar class action lawsuits throughout the country involving virtually every major wireless provider and tens of millions of wireless customers. Because they cannot dispute the importance of the issue presented, respondents insist that the need for review is neither "urgent" nor "compelling," and argue, on the merits, that the issue presented does not "jeopardiz[e]" the wireless industry because the rate rebates they seek somehow are *not* inconsistent with Section 332's prohibition of state regulation of wireless "rates." Resp. Br. 6-7, 16. Further, respondents erroneously contend

both that there is "no confusion [or] controversy among courts," *id.* at 8, *and* that the confusion and controversy are not "of sufficient magnitude" to warrant this Court's attention, *id.* at 11. Indeed, in their zeal to create the false impression of uniformity among the courts, respondents argue that the decision below regarding the scope of Section 332 is in accord with other decisions that *predated* the enactment of Section 332. *Id.* at 9-11.

The preemptive scope of Section 332 is an issue of exceeding national importance that has engendered conflict and confusion among the state and federal courts and agencies. The Washington Supreme Court's decision presents an ideal vehicle for this Court to resolve that conflict.

1. At the outset, it is important to refocus the inquiry on the central issue of whether damages in the form of rate refunds (or rate "rebate[s]," as respondents now prefer, Resp. Br. 7) predicated on state law constitute rate regulation prohibited by Section 332. Respondents attempt to distract attention from this inquiry by peppering their brief with inflammatory rhetoric alleging that their lawsuit seeks to require AT&T Wireless "to bill customers as promised," "to charge the rate it promised," and to require "businesses to tell the truth about billing and/or keep contractual promises." Resp. Br. 7. As the Washington Supreme Court explained, and AT&T Wireless noted in the petition, respondents did not challenge the dismissal of their breach of contract claims, Pet. 11 n.12; Pet. App. 4a n.13, and therefore this case has nothing to do with baseless claims that AT&T Wireless failed to satisfy its contractual obligations.

Instead, this case squarely presents the issue whether an award of damages in the form of a rate refund amounts to state regulation of "rates charged" that is preempted by Section 332. On this point, respondents insist that their claims do not seek to

"change, diminish, or modify the rates being charged by AT&T," and that they "d[o] not seek any relief that would disturb the uniformity of rates charged by AT&T." Resp. Br. 3. These blanket assurances, however, are directly refuted by their Complaint, which expressly seeks "compensatory damages in the form of *a refund of the difference between the amounts charged by [AT&T Wireless] and the amount, if any, which cellular users would have incurred* if [AT&T Wireless] did not engage in this practice." Pet. App. 37a.[1] (emphasis added). To award respondents the "refund" damages they seek, a court would have to impose retroactively a new rate, with a new rate increment replacing the full-minute increment adopted by AT&T Wireless. It defies logic to contend that retroactive adoption of a new rate does not "change, diminish, or modify" the rates charged by AT&T Wireless. Resp. Br. 3.

To argue otherwise, respondents embrace the tortured logic of a district court decision, which, if anything, confirms the incoherence of their theory:

> "The court finds that the relief sought in the form of a refund in the difference between the amounts charged and the amount consumers allegedly though[t] they were being charged . . . does not relate to the rates charged or services provided . . . ."

Id. at 21-22 (quoting *Bennett* v. *Alltel Mobile Comm.*, C.A. No. 96-D-232-N, slip op. at 9 (M.D. Ala. May 14, 1996)). Under respondents' view -- *i.e.*, States are free to regulate "rates" so long as they do so retroactively -- Section 332's prohibition against State rate regulation would be rendered meaningless.

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[1] Respondents do not appear to dispute that their claim for injunctive relief is moot. Resp. Br. 6; *see Hardy* v. *Claircom Communications Group*, 937 P.2d 1128, 1132 n.3 (Wash. App. 1997) (holding similar claims to be moot).

2. The preemptive scope of Section 332 is an issue of profound and widespread importance to the wireless industry and its customers. Respondents do not dispute that resolution of this issue could affect literally scores of similar class action cases pending throughout the country involving virtually every major wireless provider and tens of millions of wireless customers. Pet. App. 52a-57a (listing cases). Nor do they deny that, in the aggregate, these related lawsuits seek hundreds of millions of dollars in damages from wireless providers. Indeed, in this suit alone, respondents claim that AT&T Wireless is liable for "tens of millions of dollars" in damages. Resp. Br. 3.

Thus, respondents' claim that there is no "urgent" or "compelling" need for review is simply wrong, *id.* at 6, 16, and it rings particularly hollow in light of their arguments to the Washington Supreme Court. To secure discretionary review below, respondents argued that this case presented a "'fundamental and urgent issue of broad public import which requires prompt and ultimate determination'" because it "w[ould] impact hundreds of thousands of telephone consumers across the country." *Tenore* v. *AT&T Wireless Services*, Statement of Grounds for Direct Review, 6 (Wash. July 31, 1997) (copy lodged with the Clerk of the Court). As respondents further acknowledged, this case is "one of dozens of similar lawsuits filed . . . in state courts across the country" and a "ruling on this appeal" would "influence pending related litigation everywhere." *Id.* at 1. Respondents cannot seriously contend that the issue presented was "'fundamental and urgent,'" *id.* at 6, before the court below, but that there is "nothing novel or urgent arising" from the same issue now that it is presented to this Court, Resp. Br. 7.

Nor does the single class action settlement identified by respondents support the conclusion that these lawsuits present no impediment to Congress' efforts to ensure uniformity of regulation of the wireless industry. *Id.* at 7. Far from

undermining the importance of review, this $8.4 million settlement confirms both that the damages sought in these numerous cases are substantial and that respondents' "rebate" theory of liability directly implicates the rates charged by wireless providers. Resp. App. C-25 (tying individual settlement awards to monthly minutes of usage).[2] Indeed, the fact that one of the many pending class actions settled for such an exorbitant amount highlights that, in the aggregate, these scores of pending cases present a substantial threat to Congress' efforts to ensure uniform national regulation of the wireless industry by divesting States of "any authority" to regulate "rates." 47 U.S.C. § 332(c)(3)(A).

3. The core of respondents' argument against review consists of two points. *First*, they argue, incorrectly, that "[t]here is no confusion and controversy among the courts -- the decisions are uniform." Resp. Br. 8. *Second*, they contend that the "holdings from the highest state courts are in accord with the Washington Supreme Court." Resp. Br. 10. These claims do not withstand scrutiny.

First, respondents cannot seriously deny that state and federal courts and agencies have reached conflicting conclusions regarding the preemptive scope of Section 332. Pet. 15-19. In *Simons* v. *GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. Apr. 11, 1996), for example, the Texas court expressly held that "all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)." Pet. App. 62a (Texas law defining "unreasonable practices" preempted by Section 332). Similarly, in *Ball* v. *GTE Mobilnet, Inc.*, No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998), the California court flatly rejected plaintiffs' claim that

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[2] Under the terms of that settlement, class participants would receive a one-time payment or bill credit of between $3 and $26, Resp. App. C-25, while Settlement Class Counsel would receive $1,686,000, *id.* at C-30.

their challenge to the "nondisclosure" of "rounding up" was not preempted by federal law. Pet. App. 63a-64a. Finally, the lower court's decision here overruled a published decision by that State's Court of Appeals which preempted the same claims advanced by respondents in this case. *Id.* at 32a.

Second, respondents argue, based solely on the Illinois Supreme Court's decision in *Kellerman* v. *MCI Telecomms. Corp.*, 493 N.E.2d 1045 (Ill. 1986), that review should be denied because the "highest state courts are in accord" with the decision below. Resp. Br. 10-11. In *Kellerman*, a case decided 7 years before the enactment of Section 332, the court rejected a preemption challenge to state law claims because, among other things, "no Federal statute or regulation ha[d] been brought to [the court's] attention which would expressly prohibit these actions." 493 N.E.2d at 1052. Because Section 332 was enacted years later, see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 394, it could not have been brought to the *Kellerman* Court's attention. Consequently, respondents have no support for their claim that the decision below "is in accord" with any decisions by the highest state courts. Resp. Br. 11.[3]

To be sure, respondents are correct that AT&T Wireless does not claim that this issue has generated a conflict among the federal courts of appeals or the highest state courts. *Id.* at 8,

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[3] For the same reason, respondents' reliance on *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633-34 (6th Cir. 1987), as support for their claim of uniformity also is inappropriate. Indeed, it is telling that respondents rely most heavily on cases that predate the enactment of Section 332 and that do not involve an express preemption provision. *See* Resp. Br. 5-6, 9-11, 19-21) (relying on *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976); *Kellerman*, 493 N.E.2d at 1045; *In re Long Distance*, 831 F.2d at 627). Essentially, their position must be that Congress' enactment of an express preemption provision such as Section 332 has no effect on a court's preemption analysis.

15-16. But they simply ignore the importance of timely resolution of this issue when they argue that review should be delayed until additional courts address Section 332's preemptive effect. *Id.* at 15-16. A conflict among the States' highest courts or the federal courts of appeals is not an absolute prerequisite to review by this Court. See Sup. Ct. R. 10(c) (authorizing review when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"). Indeed, the Court regularly grants review to address important issues of federal law.[4] Moreover, review is warranted where the same issue is presented in numerous cases pending in the lower courts, thereby counseling for a definitive ruling by this Court.[5]

Here, there can be no doubt that resolution by this Court of the proper scope of Section 332 is an important issue that will have a profound effect on an industry that Congress recognized was a vital component of the Nation's telecommunication's infrastructure. See H.R. Rep. No. 103-111, at 260, *reprinted in* 1993 U.S.C.C.A.N. 378, 587. It is undisputed that the same issue has arisen in scores of similar class action lawsuits affecting nearly every major wireless

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[4] *See, e.g.*, *American Airlines* v. *Wolens*, 513 U.S. 219, 226-27 (1995) (granting review to address question of federal preemption); *Lividas* v. *Bradshaw*, 512 U.S. 107, 116 (1994) (granting review to "address the important questions of federal labor law"); *Morales* v. *Trans World Airlines*, 504 U.S. 374, 378 (1992) (granting review to consider whether Airline Deregulation Act preempts state law claims); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 247 (1991) (granting review to resolve important question of "statutory interpretation"); *Crandon* v. *United States*, 494 U.S. 152, 157 (1990) (granting certiorari to review construction of an "important statute").

[5] *See Laing* v. *United States*, 423 U.S. 161, 167 (1976) (noting conflict and granting review where "70 pending cases in the federal courts depended on [an issue's] resolution"); *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302 & n.2 (1947) (issue presented affected hundreds of pending cases).

carrier and tens of millions of wireless customers, Pet. App. 52a-57a, and that final resolution of this issue would have an immediate and substantial impact on all of these cases. More critically, further delay in resolving the preemptive scope of Section 332 would permit a patchwork of conflicting decisions to frustrate Congress' efforts to ensure regulatory uniformity and certainty through its command that States have no authority to regulate wireless "rates." 47 U.S.C. § 332(c)(3)(A).[6]

4. Apart from the importance of the issue presented, review also is appropriate because the Washington Supreme Court's decision conflicts with decisions of this Court on important issues regarding federal preemption law.

Respondents disagree, arguing that there can be no such conflict because the "Washington Supreme Court [sic] opinion is consistent with [*Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)]." Resp. Br. 21. Further, they allege that "[n]ot only d[id] AT&T fail to distinguish . . . *Nader* in the analytical portion of its petition -- it does not even mention it at all." *Id.* at 20. That is false. In the petition, AT&T Wireless explained that the Washington Supreme Court's reliance on *Nader* was

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[6] Respondents also suggest that this Court lacks jurisdiction because the federal issue "could be rendered moot should respondents lose on other issues on remand." Resp. Br. 17 n.8 (citing *Jefferson* v. *City of Tarrant, Ala.*, 118 S. Ct. 481 (1997)). As explained in the petition, the Washington Supreme Court's decision falls comfortably within the jurisdiction of this Court. Pet. 12 n.14 (citing cases). Unlike *Jefferson* -- a case in which reversal of the State Supreme Court's decision would affect only "two of the four counts in petitioners' complaint," 118 S. Ct. at 486 -- jurisdiction in this case is secure because the Washington Supreme Court squarely confronted the issue of preemption under Section 332; reversal of that decision will preclude further litigation in this case; and without immediate review, the decision below "might seriously erode federal policy" pertaining to a critical component of the national telecommunications infrastructure. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975).

inappropriate because, "unlike this case" *Nader* "involved (1) a statutory scheme that lacked any express preemption provision and (2) a challenge to a practice for which the federal agency charged by Congress with regulatory authority over the practice expressly permitted individuals to advance state common-law claims." Pet. 11 (citations omitted).

More to the point, because *Nader* did not involve an express preemption provision, the *Nader* Court applied "conflict" preemption analysis. 426 U.S. at 299. As a result, the Washington Supreme Court's heavy reliance on the "conflict" preemption analysis in *Nader* is contrary to this Court's cases which employ very different standards when assessing the scope and effect of an *express* preemption provision. Indeed, after Congress added an express preemption provision to the statutory scheme at issue in *Nader*, this Court held that claims similar to respondents' were expressly preempted. See *American Airlines*, 513 U.S. at 226-27; *Morales*, 504 U.S. at 391. Here, the lower court's conclusion that respondents' claims for damages were not preempted even though they clearly would have an "impact on rates," Pet. App. 31, cannot be reconciled with the *express* language of Section 332, which divests States of "any authority to regulate . . . rates." 47 U.S.C. § 332(c)(3)(A).[7]

Nor can the lower court's crabbed interpretation of "rates" be reconciled with this Court's recent admonitions that

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[7] Respondents rely on *American Airlines* to argue that a general savings clause is "further support against preemption," Resp. Br. 26, but they omit that the Court in *American Airlines* struck down state common law and positive law claims despite the existence of a similar "savings clause." 513 U.S. at 228. Moreover, the issue here is whether the damages sought by respondents would require "rate" regulation prohibited by Section 332, not whether a party can challenge "the other terms and conditions of commercial services" unrelated to "rate" regulation. 47 U.S.C. § 332(c)(3)(A).

the term "rates" only has meaning "when one knows the services to which they are attached." *AT&T Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998). Respondents posit that *Central Office* and other cases contrary to the lower court's decision are "wholly distinguishable" because they involved the "filed tariff doctrine," Resp. Br. 19, but they fail to explain why the Court's interpretation of the term "rates" in a filed-tariff case should not also apply when assessing whether a claim for damages regulates "rates" under Section 332.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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